

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Halfway and Ozark, Missouri)

MM Docket No. 93-186
RM-8258

To: Chief, Allocations Branch
Mass Media Bureau

**OZARK MOUNTAIN BROADCASTING, INC.'S REPLY COMMENTS TO
COMMENTS AND COUNTERPROPOSALS FILED BY
LAKE BROADCASTING AND MISSOURI RADIO, INC.**

Ozark Mountain Broadcasting, Inc. ("OMB") herewith replies to the comments and counterproposals made by Lake Broadcasting ("LB") and Missouri Radio, Inc. ("MRI") to the Notice of Proposed Rule Making ("NPRM"), DA 93-729 (released July 13, 1993). OMB will show that the comments and counterproposals filed by LB and MRI should be dismissed for containing false statements of fact intended to mislead the Commission in violation of RULE 73.1015 in that they represent part of a scheme to (i) block the proposed upgrade of KZPF-FM at Ozark, Missouri; (ii) block the enhancement of KYOO-FM at Halfway, Missouri; and (iii) abuse the Commission's Rules and Regulations relating to allotment procedures in order to limit broadcast competition in the Springfield, Missouri radio market. In support thereof the following is shown:

REPLY COMMENTS OF
OZARK MOUNTAIN BROADCASTING, INC.

No. of Copies rec'd 04 PAGE 1 OF 10
List ABCDE

1. OMB and KYOO Broadcasting Company ("KBC") (collectively "Petitioners") filed a Joint Petition for Rule Making with the Commission seeking to amend the Table of FM Allotments as follows:

<u>City</u>	<u>Present</u>	<u>Proposed</u>
Halfway, Missouri	226A	256A
Ozark, Missouri	225A	225C2

In response to Petitioner's Joint Petition, the Commission issued the NPRM seeking comments on the proposal. These two facility improvements are interrelated as the upgrade in classification can not be accomplished without the substitution at Halfway. OMB agreed to reimburse KBC for all of their reasonable and prudent expenses associated with changing the frequency of KYOO-FM.

2. LB counterproposed and requested that the Commission amend the FM Table of Allotments as follows:

<u>City</u>	<u>Present</u>	<u>Proposed</u>
Diamond City, Arkansas	-----	224A

Adoption of this proposed amendment by the Commission would block OMB's proposed upgrade of the Ozark, Missouri station KZPF-FM from Class A to Class C-2.

3. MRI counterproposed and requested that the Commission amend the FM Table of Allotments as follows:

<u>City</u>	<u>Present</u>	<u>Proposed</u>
Humansville, Missouri	-----	256A

Adoption of this proposed amendment by the Commission would block KBI's proposed enhancement of the Halfway, Missouri station KYOO-FM from 3.0 kilowatts to 6.0 kilowatts.

4. Both LB and MRI state to the Commission as a statement of fact that they intend to promptly apply for construction permits and that upon the grant of that application they intend to construct, place into operation, and seek a covering license for the new facilities.

5. John Borders is the principal in LB. John Borders is also the principal in Sunburst II, Inc. ("Sunburst II"), which is the licensee of KGBX-FM Bolivar, Missouri. KGBX's main studio is located at 840 S. Glenstone, Springfield, Missouri. KGBX-FM is a Class C2 FM Facility which places a 3.16 mV/m signal over the Springfield, Missouri metropolitan radio market.

6. Sunburst II also operates KGMV-FM Aurora, Missouri under the terms of a Network Affiliation Agreement dated September 7, 1990.¹ Aurora Broadcasting, Inc. ("ABI") is the licensee of KGMV-FM.² KGMV's main studio is located, along with KGBX-FM's main studio, at 840 S. Glenstone, Springfield, Missouri. KGMV-FM is a Class C2 FM Facility which also places a 3.16 mV/m signal over the Springfield, Missouri metropolitan radio market.

¹ By letter dated June 22, 1993, from Mr. Francisco R. Montero, Esq. to the Commission it is represented on behalf of My Country, Inc., that My Country, Inc. is the successor in interest to Sunburst II, Inc. under this Network Affiliation Agreement. This letter is accompanied by a certification signed by John Borders as President of My Country, Inc. and a certification by Dale Hendrix as President of Aurora Broadcasting, Inc., the licensee of KGMV-FM, both certifying to the Commission that My Country Inc. presently provides programming to KGMV-FM pursuant to the Network Affiliation Agreement dated September 7, 1990. A very careful and diligent search was made of the KGMV-FM public file on September 13, 1993 and again on September 16, 1993 by Gary W. Lynch. No assignment from Sunburst II to My Country, Inc. of the Network Affiliation Agreement dated September 7, 1990, is in the KGMV-FM public file as required by Commission rule.

² OMB questions whether ABI is in fact the licensee of KGMV-FM. The Annual Employment Report for 1993 for KGMV-FM dated May 28, 1993, filed with the Commission and contained in the station's public file shows "My Country, Inc. dba KGMV AM/FM Radio" as the Licensee. A copy of this Report is attached hereto as Exhibit 2. Gary W. Lynch was charged fifty cents (50c) for each photo-copy requested from the KGMV-FM public file. When Lynch asked who should be the payee on the check for these copy charges he was told, "Make it out to KGBX."

7. Both KGBX-FM and KGMY-FM have garnered a substantial share of the Springfield, Missouri metropolitan radio market and derive the overwhelming majority of their revenue from that community.

8. If the Commission adopts the FM Table amendments as suggested by the NPRM KZPF-FM, Ozark, Missouri will place a 3.16 mV/m signal over the Springfield, Missouri metropolitan radio market, making it a direct competitor to KGBX-FM and KGMY-FM.

9. After Petitioners filed their Joint Petition for Rule Making herein and during the months of June and July of 1993, John Borders solicited Mel Pulley ("Pulley"), a partner in KBC, on several occasions to assist him in persuading Gary W. Lynch ("Lynch"), the principal in OMB, to sell the Ozark Station to John Borders or in the alternative that John Borders would purchase Pulley land and provide a new transmitter for Pulley if Pulley would withdraw his consent to change KYOO-FM's frequency, thereby blocking the upgrade of the Ozark Station to Class C-2. See sworn affidavit of Mel Pulley attached hereto as Exhibit 1.

10. After the publication of the NPRM, John Borders called Lynch. In this telephone conversation John Borders told Lynch that he wanted to buy or do a LMA (Lease Management Agreement) on the Ozark Station (KZPF-FM) if the station was upgraded to C2. Lynch responded that he had not given that any thought, but that he would think about it and get back with Borders.

11. Within a few days after the above telephone call from John Borders to Lynch, Robert L. May ("May"), who is Vice President, managing partner and general manager of Sunburst II, My Country, Inc., KGBX-FM and KGMY-FM paid a personal visit to Lynch in his office. May offered Lynch "to start with — \$250,000.00" to purchase the Ozark station if

it was upgraded to Class C-2. May also indicated to Lynch that if he couldn't buy the station he would like to do a LMA on the station similar to the LMA on KGMY. Lynch indicated to May that he intended to put the station on the air, but that he would think about the LMA and get back with him.

12. On or about August 26, 1993, Lynch contacted both John Borders and May and told them that he was not interested in selling the Ozark station or a LMA on the Ozark station at that time.

13. The next communication that Lynch had from John Borders was the Comment and Counterproposals filed by LB and MRI on September 3, 1993.

14. J. Gregroy Borders, the alleged principal of MRI, is the son of John Borders. J. Gregory Borders is being used by his father, John Borders, in an attempt to stop or delay the Ozark, Missouri station, KZPF-FM, from becoming a competitor to stations KGBX-FM and KGMY-FM in the Springfield, Missouri radio market. MRI's "Comments and Counterproposal" are identical in form of text and style, were mailed on the same day and postage paid on the same postage meter as that of LB's. Both MRI's and LB's Counterproposals utilize the same engineering firm and seek specific channels in small communities that block the proposed enhancement at Halfway and upgrade at Ozark.

15. OMB believes that John Borders only involvement in radio in the past³ and currently⁴ is in large metropolitan markets, not small communities like Diamond City, Arkansas (population 601) or Humansville, Missouri (population 1,084).

16. OMB asserts that MRI and LB sought out the two small communities of Humansville and Diamond City, as they met the Commission's major criteria for allotment purposes — they were incorporated entities. Knowing that the Commission gives allotment preference to first local service over facility improvements, in most cases, MRI and LB felt comfortable that their scheme to block the proposed facility improvements at Ozark and Halfway would be successful. This assertion is proven out by MRI and LB's heavy reliance on first local service being provided to Diamond City and Humansville. Frankly, the sketchy information given by the two proponents to support an allotment to each of the two communities can be obtained from a road atlas or from some written material that can be found in a local library. OMB suspects that neither principal in MRI or LB have ever visited either Diamond City or Humansville or ascertained if either community could support or needs a local broadcast facility. Plainly, the two small communities were chosen strictly for their convenience, as they represent a means to an end — the denial of the OMB/KBC proposal.

³ KNFO-FM, Waco, Texas; WNAD, Norman, Oklahoma; KNOK-AM/FM, Dallas, Texas; KRLD, Dallas, Texas; KFJZ, Fort Worth, Texas; KQV, Pittsburg, Pennsylvania; KTSA, San Antonio, Texas and KLIF, Dallas, Texas.

⁴ Lynch attempted to verify the current status of John Borders' interests in radio stations by an inspection of the Ownership Report which is required to be kept in the KGBX-FM public file. On September 13, 1993 and on September 16, 1993, Lynch very carefully and thoroughly went through every document contained in the KGBX-FM public file and found no FCC Form 323 Ownership Report for KGBX-FM. In an abundance of caution Sidney Bowers, on September 17, 1993, independently searched the KGBX-FM public file, and found no FCC Form 323 Ownership Report.

17. OMB notes that, although the pleadings were submitted *pro se* by both MRI and LB, they obviously were drafted by legal counsel. It is also known that John Borders has retained Washington based communications counsel to handle his filings before the Commission many times in the past. OMB submits that, with both knowledge of the facts surrounding this matter and the obvious intent of both MRI and LB, no self respecting attorney would sign his name, or commit his or her firm, to pleadings which advance such willful and blatant abuse of the Commission's Rules and Regulations.

18. John Borders has willfully violated the Commission's Rules in the recent past.⁵

19. John Borders' actions in seeking to purchase or acquire control of the Ozark, Missouri station, KZPF-FM, are totally and completely inconsistent with his and his son's stated intent to the Commission that they "intend" to construct Class A stations in the small communities of Diamond City, Arkansas and Humansville, Missouri. At the best, John Borders' and J. Gregory Borders' concerted actions demonstrate their willingness to violate RULE 73.1015 to block an upgrade of the Ozark Station and thereby limit competition in the Springfield, Missouri radio market in which John Borders' is heavily invested. At the worst, their concerted actions demonstrate their willingness to violate RULE 73.1015 to extort control of the Ozark Station from OMB, thereby attempting to monopolize the Springfield, Missouri radio market.

20. OMB believes that John Borders has placed a gun (LB's and MRI's Comments and Counterproposals) to its head, and told, "Either you sell or turn over control (through a LMA) of the Ozark Station to me, or I'll block you from competing with me and my stations

⁵ See NOTICE OF APPARENT LIABILITY released 11/18/92 by the Field Operations Bureau NAL/Acct.No. 315KC0009 finding that Sunburst II on August 19, 1991, willfully violated 47 C.F.R. 73.932(c) relating to the Emergency Broadcast System and 47 C.F.R. 73.1410(e) relating to remote control.

in the Springfield, Missouri radio market." Surely this tactic is not in the public interest. This type of practice has been address by the Commission. See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, 5 FCC Rcd 3911 (1990). The Commission stated that,

expressions of interest have the status of representations to the Commission, as do any assertions contained in the pleadings filed with the Commission. Thus a statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will hence forth be considered a material misrepresentation within the meaning of Section 73.1050/40 of the Rules and would be subject to prosecution pursuant to Section 502 of the Act, forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions. *id.*

For the reasons stated above, the Commission should dismiss the comments and counterproposals filed herein by LB and MRI and adopt the proposal in the NPRM. Adopting the proposal in the NPRM and taking appropriate action against John Borders and J. Gregory Borders for their willful and conspiratorial actions in abusing the Commission's allotment procedures in an effort to limit competition in the Springfield, Missouri radio market, or in the alternative, of trying to extort control of KZPF-FM from OMB, will clearly serve the public interest.

Respectfully submitted,

Ozark Mountain Broadcasting, Inc.

by 

Gary W. Lynch, President

111 W. Broadway
P.O. Box 117
Bolivar, MO 65613
(417) 777-1596

Dated: September 18, 1993

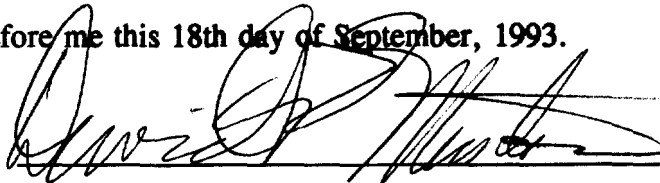
CERTIFICATION

Gary W. Lynch, of legal age and being duly sworn upon his oath states that he is the President of Ozark Mountain Broadcasting, Inc. and that to the best of my knowledge, information and belief the factual matters set forth in the above Reply Comments are true and accurate.



Gary W. Lynch

Subscribed and sworn to before me this 18th day of September, 1993.



Notary Public

DAVID R. MINTON Notary Public
Polk County State of Missouri
My Commission Expires Jan. 12, 1996

My Commission Expires: _____

CERTIFICATE OF SERVICE

I, Gary W. Lynch, President of Ozark Mountain Broadcasting, Inc., hereby certify that I have this 18th day of September, 1993, mailed by first class United States mail, postage prepaid, copies of the foregoing **"OZARK MOUNTAIN BROADCASTING, INC.'S REPLY COMMENTS TO COMMENTS AND COUNTERPROPOSALS FILED BY LAKE BROADCASTING AND MISSOURI RADIO, INC."** to the following:

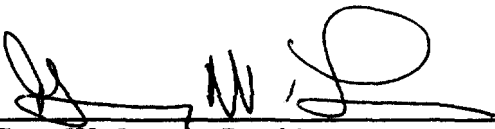
William J. Pennington, III
Attorney for KYOO Broadcasting Company
P.O. Box 2506
Pawleys Island, SC 29585

Lake Broadcasting
John Borders, Proprietor
5930 L.B.J.
Suite 400
Dallas, TX 75240

Missouri Radio, Inc.
J. Gregory Borders, President
1909 Columbia Drive
Richardson, TX 75081

Demaree Media, Inc.
Station KFAY-FM
P.O. Box 878
Fayetteville, AR 72712

Hendren-McChristian Communications
Station KXBR
Rt. 5, Hwy. 72 East
Gravette, AR 72736



Gary W. Lynch, President
Ozark Mountain Broadcasting, Inc.

AFFIDAVIT

EXHIBIT

1

COUNTY OF POLK

)

)

STATE OF MISSOURI

)

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MEL PULLEY, being duly sworn upon oath deposes and says:

That he is a resident of Bolivar, Missouri and partner in KYOO Broadcasting Company, permittee of Radio Station KYOO-FM at Halfway, Missouri.

That KYOO-FM is authorized to operate on FM Channel 226A (93.1 mHz) with 2.67 kilowatts with an antenna height of 367 feet above the average terrain.

That he filed, with Ozark Mountain Broadcasting, Inc., a joint petition for rule making seeking changes in the FM Table of allotments which would allow KYOO-FM to increase its output power so to operate with the maximum facilities authorized for Class A operation on FM Channel 256A.

That the changes in the Table of Allotments would also allow FM Station KZPF at Ozark, Missouri, on FM Channel 225A, to upgrade its facilities so to operate as a Class C2 facility on FM Channel 225.

That both himself and the principal in Ozark Mountain Broadcasting, Inc. have stated that if the changes are made in the Table of FM Allotments they would both immediately file applications for construction permits seeking the facilities changes, and if granted authority immediately construct the new facilities.

That, in his opinion, these proposed changes would greatly increase service to the public.

That he met personally with John Borders, the principal in Missouri Radio, Inc., several time in June and July of 1993 where Borders sought help from him to persuade the principal in Ozark Mountain Broadcasting, Inc, Gary Lynch, to sell him the construction permit for KZPF(FM) at Ozark.

That Borders offered to purchase land and provide a new transmitter for him if he would not consent to change KYOO-FM's frequency to Channel 256A, thus not allowing the Commission to substitute Channel 225C2 for Channel 225A at Ozark and permitting KZPF to upgrade to Class C2 status.

That Borders called him at least three times after the meetings in June and July still seeking help in either blocking an upgrade of KZPF(FM) or persuading Lynch to sell the construction permit for KZPF(FM) to him.

That he has also been contacted by Bob May, an employee of Borders concerning help in persuading Lynch to sell the KZPF(FM) construction permit.

That Borders currently owns KGBX(FM) at Bolivar, Missouri, a Class C2 facility, and operates another Class C2 FM facility, KGMY at Aurora, Missouri, under a lease management agreement.

That both stations operate from studios in Springfield, Missouri and garner an impressive

audience share in the Springfield radio market.

That, in his opinion, Borders has taken a number of measures over the past months to either block an upgrade of KZPF(FM) or make the permittee of the station sale the construction permit to him.

That the "Comments and Counterproposal" filed by Lake Broadcasting (Borders), seeking a first local service on FM Channel 224A at Diamond City, Arkansas, is nothing more than an attempt to either make Ozark Mountain Broadcasting, Inc. sell the construction permit for KZPF(FM) or block any upgrade of the facility.

That J. Gregory Borders, the principal in Missouri Radio, Inc., whose "Comments and Counterproposal" filed in this proceeding seeking a first local service on FM Channel 256A at Humansville, Missouri, is the son of John Borders, principal in Lake Broadcasting, and is nothing more than another attempt to make Ozark Mountain Broadcasting, Inc. sell the construction permit for KZPF(Fm) or block any upgrade of the facility.

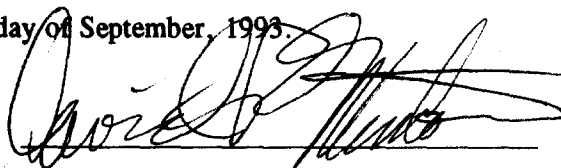
That the fact that both Missouri Radio Inc.'s and Lake Broadcasting's comments and counterproposal's are identical in form of text and style, were mailed the same day and postage paid on the same postage meter, utilize the same engineering firm, seek specific channels in small communities that block the proposed enhancements at Halfway and upgrade at Ozark, and that at least one, and possibly both, of the proponents for the counterproposals have a great deal to gain if proposal for Halfway and Ozark is denied give a clear indication that the counterproposals represent an abuse of the Commission's allotment procedures in an effort to limit competition in the Springfield, Missouri radio market.

That his conclusion is bolstered by the fact that Borders has repeatedly called and/or arranged meetings with him in an effort to seek help in either blocking the Halfway/Ozark proposal or getting Ozark Mountain Broadcasting, Inc. to sell the construction permit for KZPF(Fm) to Borders.

That it is his opinion that the actions taken in this proceeding by Missouri Radio, Inc. and Lake Broadcasting represent an abuse of the Commission's Rules and Regulations and warrant a dismissal of the comments and counterproposals filed by those parties in this proceeding.


Mel Pulley

subscribed and sworn to before me this 18th day of September, 1993.



Notary Public

My Commission expires: 1-12-96

DAVID R. MUNTON Notary Public
Polk County State of Missouri
My Commission Expires Jan. 12, 1996

BROADCAST STATION
ANNUAL EMPLOYMENT REPORT 1993

Approved by OMB
3060-0390
Expires 9/30/93

(For FCC Use Only)

Code No.

SECTION I

A. Name of Licensee or Permittee MY COUNTRY, Inc. dba KGMV AM/FM Radio	B. Address 840 S. Glenstone Springfield, MO 65802
--	---

SECTION II

A. TYPE OF RESPONDENT (check ONLY one)

COMMERCIAL BROADCAST STATION		NONCOMMERCIAL BROADCAST STATION		HEADQUARTERS
AM <input type="checkbox"/> AM	TV <input type="checkbox"/> TV	ER <input type="checkbox"/> Educational AM or FM Radio	HQ <input type="checkbox"/>	
FM <input type="checkbox"/> FM	LP <input type="checkbox"/> Low Power TV	ET <input type="checkbox"/> Educational TV		
AF <input checked="" type="checkbox"/> Combined AM & FM in same area (must file a combined report)	IN <input type="checkbox"/> International			

B. List call letters and location(s) of included stations. AM station is to be listed first in a combined report. Provide former call letters for each station if changed since last 395-B report.

CURRENT CALL LETTERS	LOCATION(S)	FORMER CALL LETTERS
KGMV	Springfield, MO	

SECTION III

A. PAY PERIOD COVERED BY THIS REPORT (DATE)

3-1-93

B. CHECK APPLICABLE BOX

- ☐ Fewer than five full-time employees during the selected payroll period (Complete page one only and certification statement and return to FCC)
- ☒ Five or more full-time employees during selected payroll period (Complete all sections of form and certification statement and return to FCC)

SECTION IV CERTIFICATION

This report must be certified, as follows: (a) By licensee, if an individual; (b) By a partner, if a partnership (general partner, if a limited partnership); (c) By an officer, if a corporation or an association; or (d) By an attorney of the licensee, in case of physical disability or absence from the United States of the licensee.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

I certify to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed

Robert L. May

Title

V.P. /Managing Partner

Print Name

Robert L. May

Date

5-28-93

Telephone No.

(417) 864-1059

EXHIBIT

2

FCC 395-B
March 1993

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SECTION V - EMPLOYEE DATA

A. FULL-TIME PAID EMPLOYEE DATA

JOB CATEGORIES	TOTAL (a-j)	MALE					FEMALE				
		WHITE (NOT HISPANIC) (a)	BLACK (NOT HISPANIC) (b)	HISPANIC (c)	ASIAN OR PACIFIC ISLANDER (d)	AMERICAN INDIAN, ALASKAN NATIVE (e)	WHITE (NOT HISPANIC) (f)	BLACK (NOT HISPANIC) (g)	HISPANIC (h)	ASIAN OR PACIFIC ISLANDER (i)	AMERICAN INDIAN, ALASKAN NATIVE (j)
OFFICIALS & MANAGERS	1	1									
PROFESSIONALS	2	2					2				
TECHNICIANS											
SALES WORKERS											
OFFICE & CLERICAL											
CRAFT WORKERS (SKILLED)											
OPERATIVES (SEMI-SKILLED)											
LABORERS (UNSKILLED)											
SERVICE WORKERS											
TOTAL	3	3					2				

B. PART-TIME PAID EMPLOYEE DATA

JOB CATEGORIES	TOTAL (a-j)	MALE					FEMALE				
		WHITE (NOT HISPANIC) (a)	BLACK (NOT HISPANIC) (b)	HISPANIC (c)	ASIAN OR PACIFIC ISLANDER (d)	AMERICAN INDIAN, ALASKAN NATIVE (e)	WHITE (NOT HISPANIC) (f)	BLACK (NOT HISPANIC) (g)	HISPANIC (h)	ASIAN OR PACIFIC ISLANDER (i)	AMERICAN INDIAN, ALASKAN NATIVE (j)
OFFICIALS & MANAGERS											
PROFESSIONALS	3	3									
TECHNICIANS											
SALES WORKERS											
OFFICE & CLERICAL											
CRAFT WORKERS (SKILLED)											
OPERATIVES (SEMI-SKILLED)											
LABORERS (UNSKILLED)											
SERVICE WORKERS											
TOTAL	3	3									